

In the Matter of MIDLAND STEAMSHIP LINES, INC. and NATIONAL
MARITIME UNION OF AMERICA (C. I. O.)

Case No. 8-C-1729.—Decided January 16, 1946

DECISION

AND

ORDER

On June 20, 1945, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter the NMU filed exceptions to the Intermediate Report. No request for oral argument before the Board was made by any of the parties and none was held. The Board has considered the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

The Board has considered the Intermediate Report, the exceptions filed by the NMU, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the complaint against the respondent, Midland Steamship Lines, Inc., Cleveland, Ohio, be, and it hereby is, dismissed.

INTERMEDIATE REPORT

Mr. George F. Hayes, for the Board.

Messrs. Duncan, Leckie, McCreary, Schlitz & Hinslea, by *Mr. Lucian Y. Ray*, of Cleveland, Ohio, for the respondent.

Mr. Frank Jones, of Cleveland, Ohio, and *Mr. Jack Kramer*, of Buffalo, N. Y., for the NMU.

STATEMENT OF THE CASE

Upon an amended charge duly filed by National Maritime Union of America (C. I. O.), herein called the NMU, the National Labor Relations Board, herein called the Board, by its Regional Director for the Eighth Region (Cleveland,

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Ohio), issued its complaint dated April 3, 1945, against Midland Steamship Lines, Inc., herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint together with the notice of hearing thereon were duly served upon the respondent and the NMU.

With respect to the unfair labor practices, the complaint alleged in substance that the respondent: (1) between April 1944 and June 1944 engaged in a plan and continuous course of anti-union conduct, urged, persuaded, and warned its employees to refrain from joining or voting for the NMU in a Board-ordered election, stated that it preferred another labor organization to the NMU, and threatened union members with dismissal; (2) on June 14, 1944, discharged Patrick T. Sheehan, and thereafter failed and refused to reemploy him because of his NMU membership and activities, and (3) by such acts interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

Prior to the hearing, the respondent filed its answer admitting the jurisdictional allegations of the complaint, but denying the commission of any unfair labor practices.

Pursuant to notice, a hearing was held at Cleveland, Ohio, and at Lorain, Ohio, on April 17, 1945, and on April 25, 1945, before the undersigned, Arthur Leff, the Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented at the hearing by counsel and the NMU by representatives. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded to all parties. Near the close of the hearing, the undersigned granted a motion of counsel for the Board to conform the pleadings to the proof with respect to the spelling of names, dates, and other minor variances but not as to any substantive matter. Near the close of the hearing the respondent moved for orders (1) striking those allegations of the complaint to which no reference was made in the charge, and (2) dismissing the complaint for want of proof. Ruling on the respondent's motions was reserved. Following the hearing, the respondent withdrew its motion to strike. The motion to dismiss is disposed of by the recommendations made below. At the close of the hearing, counsel for the Board and the respondent argued orally before the undersigned, and counsel for the respondent subsequently filed a brief with him¹

Upon the record thus made and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent, a Delaware corporation with its principal offices and place of business in Cleveland, Ohio, is engaged in the operation of bulk freight vessels on the Great Lakes, carrying bulk freight such as coal, ore and grain to various ports on the Great Lakes. The respondent admits that it is engaged in commerce within the meaning of the Act.

¹ Following the close of the hearing, the Regional Director for the Eighth Region filed a motion to reopen the record in this proceeding and for leave to file an amended complaint. The said motion was denied by the Chief Trial Examiner.

II. THE ORGANIZATION INVOLVED

National Maritime Union of America, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the respondent.

III. THE ALLEGED UNFAIR LABOR PRACTICES

I. Introduction

In April 1943, the NMU began to organize the respondent's employees. Following the filing of a representation petition in September 1943, the Board, on November 18, 1943, directed that an election be held among all unlicensed personnel, including stewards, on the respondent's vessels. The election was originally scheduled for 1943, but, the shipping season having ended before the election could be held, it was thereafter postponed until the 1944 season. The Seafarers' International Union of North America, Great Lakes District (A. F. L.), herein called the SIU, having in the meantime made a claim of interest, the Board, on May 24, 1944, amended its Direction of Election to give the SIU a place on the ballot. Balloting in the election took place from June 1, 1944 to June 8, 1944. A majority of the eligible voters participating in the election voted in favor of the NMU. On October 17, 1943, the Board, overruling the respondent's objections to the conduct of the election, certified the Union as the bargaining representative of the respondent's unlicensed personnel.²

2. *The alleged discriminatory discharge; alleged interference, restraint, and coercion*

Patrick T Sheehan, who had previously been employed as a porter by the respondent during the navigating seasons of 1941, 1942, and 1943, having been rehired in the same capacity for the 1944 season, on March 25, 1944, joined the crew of the steamer *E. N. Saunders, Jr.*, a vessel on which he had worked during the preceding season.³ As a porter, Sheehan was a member of the galley crew which, in addition to Sheehan, consisted of John E. Freitas, the steward, John McArtney, the second cook, and Edward Nowasall, another porter. McArtney had served with Sheehan on the *Saunders* during the previous season but Freitas and Nowasall were new to the vessel. As steward, Freitas was the supervisor in charge of the galley crew.⁴ Freitas admitted while testifying that prior to the election he had signed an SIU pledge card, but, so far as the record discloses, he did not engage actively in the election campaign beyond expressing to McArtney his disapproval of the NMU on one occasion while McArtney was soliciting his membership in the NMU.

A member of the NMU since 1942, Sheehan was elected to the office of ship's delegate in the early part of April 1944. The record does not disclose the extent of his organizing activities, but his position as union representative was admit-

²The findings of fact made in this introductory paragraph are based in part upon the formal proceedings in the representation proceeding (In the *Matter of Midland Steamship Line, Inc. and National Maritime Union of America*, Case No. 8-R-1295). The parties were informed at the hearing that judicial notice would be taken of these proceedings.

³The shipping season on the Great Lakes usually begins in the early part of April and ends in November.

⁴The supervisory status of stewards, conceded by the respondent, was recognized by the Board in the representation proceeding, referred to above, but they were found, nevertheless, to be appropriately in a bargaining unit of unlicensed personnel in view of the long established custom in the maritime industry.

tedly known to the respondent. Sheehan testified that one morning in mid-April 1944, Raymond McGary, First Mate of the *Saunders*, entered the dining room where the galley crew was eating, and addressed Sheehan as "Patty Sheehan, NMU delegate." In response to McGary's salutation, Sheehan, according to his testimony, said, "So what?" and McGary replied, "I got orders from J. J. Freitas,⁵ the general manager, to put all delegates off the ship." Sheehan's testimony in this respect was corroborated by McArtney, and although partially denied by McGary, is credited by the undersigned.⁶

Sheehan was discharged on June 14, 1944, 8 days after balloting in the Board conducted election took place on board the steamer *Saunders*. The discharge was effected by Freitas when the vessel reached the port of Ashtabula, Ohio. Freitas testified that he discharged Sheehan "because he wouldn't do his work and the other porter was threatening to quit."

On the issue as to whether Sheehan properly performed his work during the 1944 season, most of the facts are in substantial dispute. It is, however, not disputed that when the galley crew began functioning at the start of the season, Freitas, the steward, after outlining to McArtney how he operated his galley and what he expected, turned over to McArtney, the second cook, the handling of the porters and the designation of their duties. McArtney, according to his testimony, gave Nowasall specific assignments, including the making of beds in the officers' quarters, but did not expressly assign any specific duties to Sheehan since he believed that Sheehan, because of his past experience, knew what his duties were.

Freitas testified substantially as follows: After the vessel had made several trips, Freitas began to receive complaints from Nowasall that Sheehan was not performing his fair share of the porter's work, particularly with reference to the officers' quarters. Freitas at first referred the matter to McArtney, but after McArtney advised him that he could do nothing with Sheehan, Freitas withdrew from McArtney the responsibility over the porters which he had previously delegated to McArtney and himself assumed such responsibility. Thereafter, Freitas spoke to Sheehan on three occasions, twice before the election and once after the election and admonished Sheehan that he would have to assume his burden of the porters' work. When thus spoken to, Sheehan displayed marked resentment, and, although increasing the quantity of his work somewhat after such talks, still refused to take care of the mates' quarters and failed to perform other work expected of him such as the shining of brass. Sheehan's failure to perform his work led to continuing complaints from Nowasall about his work burden and threats by the latter to quit, and also made it necessary for Freitas to help with some of the porters' work. In consequence of the foregoing, Freitas concluded, he decided to, and did, discharge Sheehan.

Sheehan, on the other hand, denied that he had ever failed to perform any work required of him;⁷ denied that there was any friction between him and Nowasall about their respective work loads; denied that Freitas had ever spoken to him

⁵ J. J. Freitas is an uncle of John Freitas, the steward.

⁶ McGary testified that he recalled addressing Sheehan on one occasion as NMU delegate, but denied that he had said anything about putting delegates off the ship or having any orders to that effect. According to McGary's version, Sheehan's reply to his salutation was, "Where are you getting your news?" and that nothing further was said. Since Sheehan's position with the NMU was well known, it is improbable that he would have made the remark attributed to him by McGary. Sheehan's corroborated version, particularly in view of McGary's partial admission, impressed the undersigned as reasonable and is credited.

⁷ Sheehan admitted that he never made any of the beds in the officers' quarters, but testified that this was the duty of the other porter.

about his work; and asserted that during the 1944 season he performed precisely the same work as he had done during preceding seasons.

Nowasall did not testify.⁸ McArtney, a Board witness obviously friendly to Sheehan, gave testimony to support Sheehan in the respects noted above. Moreover, in response to direct questions, McArtney denied that he had ever heard any complaints about Sheehan's work, and denied further that Freitas had ever spoken to him about Sheehan's work or had relieved him of responsibility over the porters because of his inability to manage Sheehan.

However, interspersed in McArtney's testimony, are other statements made by him which serve not only to impair his credibility, as well as that of Sheehan, in material respects, but which reveal unmistakably that Sheehan's work was a subject of complaint and a cause of friction in the galley. Thus, McArtney testified at one point:

Eddie [Nowasall] seemed to think he was doing too much work, and he would tell me to tell Pat [Sheehan] about it. Then I told Ed to fix the beds as we were doing the year previous. Eddie objected to that and went to the steward . . . He overruled me and from there on I said, "Well, if I have to fight with the porters, and get myself in wrong, to deuce with it."

And at another point:

Q. Did you have to go to the steward, in 1944, and say "Now I can't handle this situation, you take over?"

A. No, I simply ignored the matter.

Q. You ignored the matter?

A. Yes, I refused to quarrel with them.

And at a third point:

Q. You stated on cross-examination that you turned the porters back to Freitas. Would you give us the approximate time of the season when you told Freitas—

A. No, I did not tell Freitas. I simply ignored the issue, see what I mean.

Q. What was the approximate day on which you ignored them?

A. The approximate date would be probably three weeks after we got running.⁹

Elsewhere in his testimony, McArtney expressly admitted that "Nowasall complained about doing too much work," and that "Eddie [Nowasall] thought that Pat [Sheehan] wasn't doing enough."

The excerpts from McArtney's testimony, quoted above, supply a key to at least a partial resolution of the conflict in testimony heretofore noted, and, to that extent, tend to authenticate Freitas' testimony in controverted aspects. On the basis of the entire record, the undersigned believes, and he finds, that friction did in fact exist in the galley during the 1944 season, friction arising from Nowasall's belief, which Freitas shared, that Sheehan was not performing his proper share of the porters' work. Since, as it is found, Nowasall's complaints were carried to Freitas who found it necessary to relieve McArtney of responsibility over the porters because of McArtney's inability to cope with the situation, Sheehan's denial that Freitas ever spoke to him about his work, impresses the undersigned as neither reasonable nor credible, and it is so found.

⁸ Nowasall was no longer employed by the respondent at the time of the hearing. Neither were Freitas and McArtney.

⁹ This is about the time when Freitas, according to his testimony, referred Nowasall's complaints to McArtney and McArtney said he could do nothing with Sheehan. McArtney's above-quoted testimony thus appears to confirm Freitas' testimony in that respect.

Conclusion

In support of his contention that Sheehan's discharge had a discriminatory motivation, counsel for the Board relies upon (a) the statement made by McGary to Freitas that he had orders from the general manager to put all union delegates off the boat; (b) upon testimony of McArtney (not heretofore reported) concerning part of a conversation overheard by him, after the election, between the boat's chief engineer and Freitas, in which the chief engineer said, "Well, why don't you let him go and get a high school kid?" and Freitas replied, "I think I will. The election is over"³⁰; and (c) upon the fact that Freitas, who effected the discharge, favored the SIU and opposed the NMU.

The record does not warrant a conclusion that Freitas in discharging Sheehan was acting upon express orders from the respondent's general manager or was otherwise effectuating a policy dictated by higher management. McGary testified that in fact he had no orders from the general manager to put union delegates off the ship. McGary's remarks to Sheehan were made approximately 2 months before Sheehan's discharge. The intervening lapse of time tends to substantiate McGary's testimony in this respect and to repeal a finding that Sheehan was discharged pursuant to such orders. So, too, does Freitas' conversation with the chief engineer shortly after the election. Freitas' statement, "I think I will [discharge Sheehan]", indicates that the discharge decision rested with him personally and did not emanate from the general manager's office. Notwithstanding the allegation in the complaint that the respondent "engaged in a plan and continuous course of [anti-union] conduct," the record is singularly free of proof that except for McGary, any supervisory employee aboard the respondent's vessels engaged in any anti-union statements or conduct. And it is undisputed that, as first mate, McGary has no jurisdiction whatever over the steward or the employees in the steward's department.

Nor can the conversation between Freitas and the chief engineer be viewed as showing a discriminatory design. The equivocal reference to the election is not inconsistent with a conclusion that Sheehan's discharge, although for cause, was withheld until after the election because of the implications adverse to the respondent which might otherwise have been read into a discharge of a union delegate timed immediately prior to an election. While not controlling, the fact that the discharge was delayed until after the election, points more in the direction of nondiscriminatory than it does toward discriminatory motive.

As a member of the bargaining unit, Freitas, although a supervisory employee, was free to express his views concerning his choice of representatives, and, standing alone, neither his designation of the SIU nor his statement to McArtney may properly be construed as an expression of the respondent's will. It is true that if Freitas' discharge action had been prompted in whole or in part by his disapproval of Sheehan's NMU activities, even though that disapproval were a personal one, the respondent would have been responsible for the action of its agent acting within the scope of his delegated authority. But, on the facts of the instant case, the undersigned is not persuaded that an inference of discriminatory motive can reasonably be spelled out from Freitas' adherence to the SIU, without more.

³⁰ Although Sheehan's name was not expressly mentioned in this conversation, McArtney testified that other circumstances led him to the conclusion that reference was being made to Sheehan. Freitas, who followed Sheehan on the stand, did not deny McArtney's testimony in this respect. It is found that the conversation occurred substantially as testified by McArtney and that Sheehan was the object of the conversation.

Sheehan's 4-year employment history and outstanding position in union organization aboard the *Saunders* are, of course, factors entitled to considerable weight in any appraisal of the issue here under consideration. Had the record satisfactorily established that the respondent's contention as to its reason for discharging Sheehan was without foundation, or a mere pretext, these factors combined with other circumstances in the record might have warranted an inference of discrimination. But part of the testimony of Sheehan and McArtney relating to Sheehan's work in 1944 has been found not to be credible and the balance of their testimony on this subject therefore takes on a dubious color. It is not decisive that Sheehan at the start of the 1944 season may have assumed and thereafter performed the identical work (neither more nor less) performed by him during the previous season when another steward had supervision over the galley. The fact remains, as the record establishes, that Sheehan's work performance in 1944 gave rise to friction and dissatisfaction in the galley, that Freitas sided with Nowasall when the latter made complaints, and that Freitas believed as did Nowasall that Sheehan was not performing his fair share of the porters' work. There is nothing in the record to support a conclusion that Freitas was unreasonable in expecting more work of Sheehan, or that he acted in bad faith in supporting Nowasall. Under all the circumstances the undersigned is not persuaded that the reason assigned by the respondent for Sheehan's discharge must be put aside as implausible or regarded as unreasonable. It is found that the Board has not sustained the burden of establishing the allegations of the complaint that Sheehan was discriminatorily discharged.

The undersigned finds no substantial evidence to support the allegations of the complaint that the respondent urged, persuaded, and warned its employees to refrain from voting for the Union in the election or that it expressed its preference for another labor organization. The respondent contends that McGary's statement to Sheehan, noted above, could only be construed as meaning that the respondent's rule requiring passes to come aboard the vessel would be enforced against outside union delegates and as having no application to persons like Sheehan who were already on the vessel as members of the crew. It is considered unnecessary to pass on this contention, since the undersigned is not persuaded, on the record in this case, that McGary's remarks are sufficiently substantial, standing alone, to constitute interference, restraint, and coercion within the meaning of the Act. There being no other evidence of unfair labor practices, it will be recommended that the complaint be dismissed.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The operations of the respondent, Midland Steamship Lines, Inc., constitute trade, traffic, and commerce among the several States, within the meaning of Section 2 (6) of the Act.

2. National Maritime Union of America, affiliated with the Congress of Industrial Organizations, is a labor organization, within the meaning of Section 2 (5) of the Act.

3. The respondent has not engaged in unfair labor practices within the meaning of Section 8 (1) of the Act.

4. By discharging and refusing to reinstate Patrick T. Sheehan, the respondent has not engaged in unfair labor practices within the meaning of Section 8 (3) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned recommends that the complaint against Midland Steamship Lines, Inc., be dismissed in its entirety.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended, effective July 12, 1944, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

ARTHUR LEFF,

Trial Examiner.

Dated June 20, 1945.